

STOKES
BARTHOLOMEW
EVANS & PETREE

A PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW

NASHVILLE • MEMPHIS • MUSIC ROW

424 CHURCH STREET, SUITE 2800
NASHVILLE, TENNESSEE 37219-2386
(615) 259-1450 • FAX (615) 259-1470
www.stokesbartholomew.com

RECEIVED

2005 JUN -8 PM 1:44

T.R.A. DOCKET ROOM

CHARLES W. COOK, III
CCOOK@STOKESBARTHOLOMEW.COM

DIRECT DIAL (615) 259-1456
DIRECT FAX (615) 259-1470

June 8, 2005

Via Hand Delivery

Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re. In Re Citizens Telecommunications Company of Tennessee, LLC's d/b/a
Frontier Communications of Tennessee
Docket No 04-00379

Dear Chairman Miller

Enclosed for filing in the above-referenced proceeding are an original and fourteen copies
of Frontier Communications, Inc.'s Brief Addressing Issues in Pending Motion to Dismiss

Should you have any questions, please do not hesitate to call

Very truly yours,

STOKES BARTHOLOMEW
EVANS & PETREE P A



Charles W. Cook, III

CWC/eu
Enclosures

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

**IN RE: PETITION OF FRONTIER)
COMMUNICATIONS, INC. FOR)
DECLARATORY RULING) No. 04-00379**

**FRONTIER COMMUNICATIONS OF AMERICA, INC.'S
BRIEF ADDRESSING ISSUES IN PENDING MOTION TO DISMISS**

Frontier Communications of America, Inc. ("Frontier") respectfully submits this response to the motion to dismiss filed by Ben Lomand Rural Telephone Cooperative, Inc. ("Ben Lomand") in accordance with the TRA's procedural order, dated May 27, 2005

INTRODUCTION AND SUMMARY OF ARGUMENT

By Order, dated November 24, 2004 (Docket No 04-00233), the Tennessee Regulatory Authority (the "Authority" or "TRA") approved an interconnection agreement (the "Interconnection Agreement") between Frontier and Ben Lomand, dated July 6, 2004 (with August 2, 2004 cover letter), a copy of which is attached to Frontier's Petition as Exhibit B. It provides as follows.

13 1 This Agreement will become effective upon

(a) issuance of a final order by a regulatory body or court with the requisite jurisdiction to grant Citizens with all necessary regulatory approval and certification to offer local exchange and local exchange access services in the geographic areas to which this Agreement applies, and

(b) approval of this Agreement by the Commission

(Upon information and belief, none of the telephone cooperatives that have intervened in this case have entered into interconnection agreements with CLEC's and then refused to allow them to compete in their territories Likewise, none have set up wholly-owned CLEC's to compete outside their territories)

By Order, dated June 27, 1996, the TRA granted Frontier a statewide certificate of convenience (Docket No 96-00779), and by its Order, dated November 24, 2004 in Docket No 04-00233 (referenced above), the TRA has approved the Interconnection Agreement, stating "The agreement is in the public interest as it provides customers with alternative sources of telecommunications services within the service area of [Ben Lomand]" Order, dated November 24, 2004 (Docket No 04-00233)

Notwithstanding its willingness to enter into the Interconnection Agreement, citing T.C A § 65-29-102, Ben Lomand remains steadfast that (a) Frontier cannot compete within its territory and (b) the TRA lacks jurisdiction to adjudicate Section 13 1(a) of the Agreement and determine that Frontier can provide services in Ben Lomand's territory¹ However, notwithstanding Ben Lomand's arguments (a) the TRA has jurisdiction to decide this dispute pursuant to T.C A § 65-29-130, (b) T.C A § 65-29-102 does not preclude Frontier from competing in Ben Lomand's territory, and (c) any territorial protection granted by state law is preempted by 47 U S C 253(a)

¹ Although Ben Lomand seeks to repel competition in its territory, it has formed a wholly-owned subsidiary, Ben Lomand Communications, Inc , which competes with Frontier's ILEC affiliate Citizens Telecommunications Company of Tennessee, LLC in McMinnville and Sparta As is stated below, pursuant to T C A § 65-29-102, a telephone cooperative such as Ben Lomand would otherwise be prohibited from entering the areas served by those exchanges absent a showing that "reasonably adequate" phone service was unavailable

LEGAL ANALYSIS

I. The TRA Has Jurisdiction Over This Matter.

T C A § 65-29-130 provides that the TRA may exercise jurisdiction over telephone cooperatives such as Ben Lomand for “ . (2) the hearing and determining of disputes between telephone cooperatives and any other type of person, corporation, association, or partnership rendering telephone service, relative to and concerning territorial disputes, ” T C A § 65-29-130(a)(2) Contrary to the arguments of Ben Lomand, this portion of T C A § 65-29-130(a) does not employ the word “boundary” but gives the TRA the jurisdiction to adjudicate “territorial disputes ”

Moreover, the Attorney General for the State of Tennessee has opined that if a telephone cooperative wants to provide service within an area served by a municipality, the TRA (then the “Public Service Commission”) has jurisdiction to decide the dispute pursuant to T C A § 65-29-130 See Op Atty Gen No 90-83, Aug 27, 1990 (copy attached). This case presents the same form of territorial dispute, namely one entity seeking to provide service within another entity’s boundary without regard to a dispute about the boundary itself

In this case, Frontier wants to provide services in Ben Lomand’s territory, and Ben Lomand contends that Citizens cannot enter its territory notwithstanding the fact that Frontier has approval from the TRA to provide state-wide coverage (which would include Ben Lomand’s territory) and the fact that the TRA has approved the interconnection Agreement

II. T.C.A. § 65-29-102 Does Not Protect Ben Lomand's Territory From Competition.

Ben Lomand attempts to argue that it is protected by T.C.A. § 65-29-102, which states “Cooperative, nonprofit, membership corporations may be organized under this chapter for the purpose of furnishing telephone service in rural areas to the widest practical number of users of such service, provided, that there shall be no duplication of service where reasonably adequate telephone service is available” T.C.A. § 65-29-102. However, this statute has been construed by the Tennessee Attorney General to prohibit telephone cooperatives from providing service where “reasonably adequate service is available,” not as a means for a telephone cooperative to protect its own territory. See Op Atty Gen No 90-83, Aug 27, 1990. One court, faced with a similar statute, ruled, “Private telephone companies are free to compete at any time. Telephone cooperatives may compete when no ‘reasonably adequate service’ is available.” *Intermountain Telephone and Power Co v Department of Public Service Regulation*, 201 Mont 74, 78, 651 P 2d 1015, 1017 (Mont 1982) (copy attached). Thus, in this case, Frontier is free to compete in the State of Tennessee in accordance with its Certificate of Convenience and Necessity.

III. Even If State Law Precludes Frontier From Providing Service In Ben Lomand's Territory, It Is Preempted By 47 U.S.C. § 253(a).

Even assuming that T.C.A. § 65-29-102 provides Ben Lomand with the ability to exclude a competing provider from entering its territory, 47 U.S.C. § 253(a) unequivocally states, “No State or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” 47 U.S.C. § 253(a). Accordingly, the FCC has ruled that this statute preempts T.C.A. § 65-4-201(d), which was supposed to protect the territory of ILECs

with less than 100,000 lines *In The Matter Of AVR, L P d/b/a Hyperion of Tennessee, L P*
Petition for Preemption of Tennessee Code Annotated § 65-4-201(d) and Tennessee Regulatory
Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in
Tennessee Rural LEC Service Areas, 1999 WL 335803 (F.C.C.), 14 F.C.C. Rcd 11064 (1999),
pet for reh'g den, 2001 WL 12939 (F.C.C.), 16 F.C.C. Rcd 1247 (2001) (Copies attached to
Petition: Exhibit C) For this same reason, the federal statute should preempt T.C.A. § 65-29-102
as anticompetitive

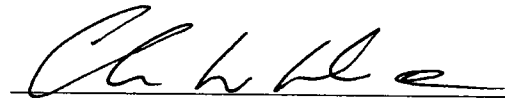
Consistent with 47 U.S.C. § 253(a) and the FCC's ruling cited above, Tennessee's
legislature has stated that it is the policy of this state "to foster the development of an efficient,
technologically advanced, statewide system of telecommunication services by permitting
competition in all telecommunications services markets " T.C.A. § 65-4-123 In fact, when
the TRA approved, the Certificate of Convenience for Ben Lomand's wholly owned subsidiary,
Ben Lomand Communications, Inc. ("BLC"), to compete outside Ben Lomand's territory, it
held that the "application would inure to the benefit of the present and future public convenience
by permitting competition in the telecommunications services markets in the State " See
TRA Order, dated April 28, 1999 (Docket No. 98-00600)

In this case, Ben Lomand appears to favor competing outside its territory, but contrary to
the policies set forth by U.S. Congress, the Tennessee legislature, the FCC and the TRA, it
resists competition when it comes knocking on its own door

CONCLUSION

For the reasons set forth herein, Ben Lomand's Motion to Dismiss should be denied, and Frontier should be granted the relief it seeks

Respectfully submitted,

A handwritten signature in cursive script, appearing to read 'Charles W. Cook, III', written over a horizontal line.

Guilford F. Thornton (No 14508)
Charles W Cook, III (No 14274)
STOKES BARTHOLOMEW
EVANS & PETREE, P.A
424 Church Street, Suite 2800
Nashville, Tennessee 37219
(615) 259-1450

Attorneys for Frontier Communications of
America, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by placing it in the U.S. Mail postage prepaid on this the 8th day of June, 2005

H LaDon Baltimore
Farrar & Bates, LLP
211 Seventh Avenue, N, Suite 420,
Nashville, Tennessee 37219

The Office of the Attorney General for the State of Tennessee
Consumer Advocate Division
P O Box 20207
Nashville, Tennessee 37202

Melvin J Malone
1200 One Nashville Place
150 Fourth Avenue North
Nashville, TN 37219



Charles W Cook, III

*1 Office of the Attorney General
State of Tennessee

Opinion No 90-83
August 27, 1990

MUNICIPAL CORPORATIONS Municipal Powers

A municipality may not permit a telephone company to enter into business in the municipality when it is already being serviced by another telephone company, since the Tennessee Public Service Commission must first approve the entry of another telephone company into the municipality's territory, pursuant to T C A. § 65-4-107, a telephone cooperative is prohibited by T C A § 65-29-130 from providing service in an area where "reasonably adequate telephone service is available", the question of whether a particular area already has "reasonably adequate telephone service" is an issue to be resolved by the Tennessee Public Service Commission, which has jurisdiction under T C A. § 65-29-130 to establish a telephone cooperative's territorial boundaries and to resolve territorial disputes arising between a telephone cooperative and any other type of person, corporation, association, or partnership rendering telephone service T C A § 1-3-103, § § 65-4-104, -107, -201 et seq , -207, § § 65-29-101 et seq , -102, - 130.

PUBLIC SERVICE COMMISSION

A municipality may not permit a telephone company to enter into business in the municipality when it is already being serviced by another telephone company, since the Tennessee Public Service Commission must first approve the entry of another telephone company into the municipality's territory, pursuant to T.C A § 65-4-107; a telephone cooperative is prohibited by R C.A § 65-29-130 from providing service in an area where "reasonably adequate telephone service is available", the question of whether a particular area already has "reasonably adequate telephone service" is an issue to be resolved by the Tennessee Public Service Commission, which has jurisdiction under T C A § 65-29-130 to establish a telephone cooperative's territorial boundaries and to resolve territorial disputes arising between a telephone cooperative and any other type of person, corporation, association, or partnership rendering telephone service T C A § 1-3-103, § § 65-4-104, -107, -201 et seq , -207, § § 65-29-101 et seq , -102, - 130

PUBLIC UTILITIES AND CARRIERS: Regulation of Public Utilities.

A municipality may not permit a telephone company to enter into business in the municipality when it is already being serviced by another telephone company, since the Tennessee Public Service Commission must first approve the entry of another telephone company into the municipality's territory, pursuant to T C A. § 65-4-107, a telephone cooperative is prohibited by T.C A § 65-29-130 from providing service in an area where "reasonably adequate telephone service is available", the question of whether a particular area already has "reasonably adequate telephone service" is an issue to be resolved by the Tennessee Public Service Commission, which has jurisdiction under T.C A § 65-29-130 to establish a telephone

cooperative's territorial boundaries and to resolve territorial disputes arising between a telephone cooperative and any other type of person, corporation, association, or partnership rendering telephone service. T.C.A. § 1-3-103, §§ 65-4-104, -107, -201 et seq, -207, §§ 65-29-101 et seq, -102, -130.

*2 TELEPHONE

A municipality may not permit a telephone company to enter into business in the municipality when it is already being serviced by another telephone company, since the Tennessee Public Service Commission must first approve the entry of another telephone company into the municipality's territory, pursuant to T.C.A. § 65-4-107, a telephone cooperative is prohibited by T.C.A. § 65-29-130 from providing service in an area where "reasonably adequate telephone service is available"; the question of whether a particular area already has "reasonably adequate telephone service" is an issue to be resolved by the Tennessee Public Service Commission, which has jurisdiction under T.C.A. § 65-29-130 to establish a telephone cooperative's territorial boundaries and to resolve territorial disputes arising between a telephone cooperative and any other type of person, corporation, association, or partnership rendering telephone service T.C.A. § 1-3-103, §§ 65-4-104, -107, -201 et seq, -207, §§ 65-29-101 et seq, -102, -130.

Authority of Municipality to Permit a Competing Telephone Company or Cooperative Within its Jurisdiction

The Honorable Jerry W Cooper
State Senator
Room 307, War Memorial Building
Nashville, Tennessee 37243-0214

QUESTIONS

(1) Whether a municipality may permit a telephone company to enter into business in the municipality when it is already being serviced by another telephone company?

(2) Whether a telephone cooperative organized under T.C.A. § 65-29-101 et seq can conduct business in a municipality which already possesses existing telephone service administered by a telephone company?

OPINIONS

(1) No, since the Tennessee Public Service Commission must first approve the entry of another telephone company into the municipality's territory, pursuant to T.C.A. § 65-4-107.

(2) A telephone cooperative is prohibited by T.C.A. § 65-29-102 from providing service in an area where "reasonably adequate telephone service is available " The question of whether a particular area already has "reasonably adequate telephone service" is an issue to be resolved by the Tennessee Public Service Commission, which has jurisdiction under T.C.A. § 65-29-130 to establish a telephone cooperative's territorial boundaries and to resolve territorial disputes arising between a telephone cooperative and any other type of person, corporation, association, or partnership rendering telephone service.

ANALYSIS

The establishment, regulation and control of public utilities, including telephone companies, is governed by Chapter 4 of Title 65 of the Tennessee Code. Chapter 4 is divided into three specific parts, with part 1 detailing the general provisions of Chapter 4, part 2 addressing the certificate of public convenience and necessity required of each public utility, and part 3 detailing both the Commission's powers to inspect and control public utilities as well as the supervision fee required to be paid by public utilities

*3 T C A. § 65-4-104, contained in part 1 of Chapter 4, grants the Tennessee Public Service Commission general supervision and regulation of, and jurisdiction and control over, all public utilities, and also over their property, property rights, facilities and franchises T C A § 65-4-107, also in part 1, specifically provides that no privilege or franchise granted to any public utility by the State of Tennessee or by any political subdivision thereof shall be valid until approved by the Public Service Commission, with such approval to be given after a hearing and a determination by the Commission that such privilege or franchise "is necessary and proper for the public convenience and properly conserves the public interest."

Part 2 of Chapter 4, codified at T.C A § 65-4-201 et seq , provides that no public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the Tennessee Public Service Commission, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment and operation T C.A. § 65-4-207 however provides that the "provisions of this part shall not apply where any municipality or county by resolution or ordinance declares that a public necessity requires a competing company in that municipality or county " (Emphasis added)

The initial question raised in this opinion request focuses on these provisions, and specifically whether T C A. § 65-4-207 grants a municipality the authority to permit a competing telephone company to come into the municipality when the Public Service Commission has not approved the competing telephone company's entry into the territory of the municipality. The Tennessee Supreme Court in 1933 definitively answered this question in the negative in the case of Holston River Electric Co. v Hydro Electric Corp , 166 Tenn 662, 64 S W 2d 509 (1933)

In that case, the town of Rogersville had issued in 1932 a franchise to the Hydro Electric Corporation, authorizing it to distribute and sell electric power within Rogersville, without the approval of the Railroad and Public Utilities Commission, the predecessor to the Public Service Commission At the time this municipal franchise was granted to the Hydro Electric Corporation, Holston River Electric Company was exercising a similar franchise granted to it by Rogersville in 1926 for a term of 25 years Holston River Electric Company commenced litigation seeking an injunction restraining the Hydro Electric Corporation from operating under its franchise unless it was approved by the Public Utilities Commission, as required by section 5453 of the Tennessee Code, presently codified at T C.A § 65-4-107

Hydro Electric Corporation contended that the approval of the Public Utilities Commission was not necessary, since section 5508 of Code, presently codified as T C A § 65-4-207, allowed a municipality by resolution or ordinance to declare that a public necessity required a competing company in the municipality. The Court found that a municipality could not by itself authorize such a competing telephone company, even under present § 65-4-207, reasoning as follows:

*4 Section 5453 of the Code, in article 1 of chapter 23 [presently codified as T C A § 65-4-107], deals specifically with franchises granted to public utilities by the state or its subdivisions, and expressly makes the approval of the Railroad and Public Utilities Commission [now the Public Service Commission] a condition precedent to the validity of any such franchise. This provision embodies a most important matter of public policy, which we cannot presume the Legislature would either adopt or discard without plainly and deliberately expressing its intention.

Sections 5502-5508, comprising article 2 of the same chapter of the Code [presently codified at T C A § 65-4-201 et seq], do not deal with franchises, but directly refer to and purport to regulate physical operations of public utilities. Since no such operations may be undertaken by a company not in possession of a franchise, whenever one is required, by law, it would seem that the regulations and control prescribed by these sections were intended to apply to and affect a utility, already holding any required franchise with the commission's approval, which might be about to engage in some specific operation in competition with another similar company. The certificate of public convenience and necessity required by these sections is clearly in addition to and not a substitute for the commission's approval of the franchise, required by section 5453 [T.C A § 65-4-107].

Giving effect to the rule of construction prescribed in section 13 of the Code [FN1] as well as to the general rule that the various sections of the Code must be reconciled if their language reasonably permits it (Dagley v State, 144 Tenn., 501, 507, 508, 234 S W , 333), we are of opinion and so hold that the Code sections 5502-5508 were not intended to and do not repeal the provision of section 5453 which requires the approval of the Railroad and Public Utilities Commission as a condition to the validity of all franchises included in that section. Holston River Electric Co v Hydro Electric Corporation, 166 Tenn 662, 667-668, 64 S W 2d 509 (1933). See also Briley v Cumberland Water Co., 215 Tenn 718, 727-728, 389 S W.2d 278 (1964) (Supreme Court stating that a municipality could not grant a valid franchise to a utility without the approval of the Public Service Commission, given after a hearing in which the Commission determines the franchise is necessary and proper for the public convenience and properly conserves the public interest).

Thus it appears that even though a municipality under T.C A. § 65-4-207 may authorize a telephone company and dispense with the necessity of obtaining a certificate of convenience and necessity under § § 65-4-201 to -206, the approval of the Public Service Commission is still necessary pursuant to T C A § 65-4-107 before the telephone company may operate.

Secondly, a municipality can only allow a telephone cooperative organized under T C A § 65-29-101 et seq. (the Telephone Cooperative Act) to conduct business in the municipality if it is determined under T C A. § 65-29-102 that "reasonably adequate telephone service" is not available to the municipality. Very unusual circumstances would have to be shown before a municipality already being serviced by a telephone company would qualify to be serviced by a telephone cooperative.

Tenn. Op Atty Gen No
Tenn. Op Atty Gen. No 90-83, 1990 WL 513064 (Tenn.A G)
(Cite as: 1990 WL 513064 (Tenn.A.G.))

[FN2] In any event, the ultimate question of whether a telephone cooperative could enter the territory of such a municipality is one for the Public Service Commission, since T.C A. § 65-29- 103 grants the Commission jurisdiction to resolve any territorial disputes between a telephone cooperative and any other entity rendering telephone service

*5 Charles W Burson

Attorney General and Reporter

John Knox Walkup

Solicitor General

William E Young

Assistant Attorney General

[FN1] Section 13, now codified at T C A § 1-3-103, declares, "[i]f provisions of different chapters or articles of the Code appear to contravene each other, the provisions of each chapter or article shall prevail as to all matters and questions growing out of the subject matter of that chapter or article "

[FN2] Even in those circumstances, the terms of the franchise granted to the existing company would be relevant in determining its rights versus those of a competing cooperative.

Tenn Op Atty. Gen No 90-83, 1990 WL 513064 (Tenn.A G)

END OF DOCUMENT

C

Supreme Court of Montana
INTERMOUNTAIN TELEPHONE AND POWER
COMPANY, Petitioner and Appellant,

v

DEPARTMENT OF PUBLIC SERVICE
REGULATION, MONTANA PUBLIC SERVICE
COMMISSION,

Respondent and Respondent

No. 81-512.

Submitted Sept 10, 1982

Decided Oct 7, 1982

Telephone utility petitioned for review of Public Service Commission's order stating that utility was not providing reasonably adequate service. The Thirteenth Judicial District Court, Yellowstone County, Robert Wilson, J., affirmed, and utility appealed. The Supreme Court, Morrison, J., held that (1) Commission had authority to issue such order, and (2) finding that utility was not providing reasonably adequate service was supported by substantial credible evidence.

Order of Public Service Commission affirmed.

West Headnotes

[1] Telecommunications 898

372k898 Most Cited Cases

(Formerly 372k261)

Public Service Commission had authority to issue order stating that telephone utility was not providing reasonably adequate service. MCA 69-3-102, 69-3-201

[2] Telecommunications 892

372k892 Most Cited Cases

(Formerly 372k261)

In proceeding before Public Service Commission, finding that telephone utility was not providing reasonably adequate service was supported by substantial credible evidence. MCA 2-4-704(2)(e), 69-3-201

[3] Telecommunications 767

372k767 Most Cited Cases

(Formerly 372k267)

Though private telephone companies are free to compete at any time, telephone cooperatives may

compete only when no reasonably adequate service is available. MCA 35-18-105(2), 69-5-103

*75 **1016 Peterson, Schofield & Leckie, Billings, Kenneth D. Peterson argued, Billings, for petitioner and appellant.

Calvin K. Simshaw argued, Helena, Crowley, Haughey, Hanson, Toole & Dietrich, Billings, for respondent and respondent.

MORRISON, Justice

On April 2, 1980, the Public Service Commission (PSC) conducted a public hearing in Custer, Montana, concerning the quality of telephone service being provided to the area by Intermountain Telephone and Power Company (Intermountain). The PSC issued a final order October 27, 1980, stating that the service was not "reasonably adequate." Intermountain petitioned the District Court of the Thirteenth Judicial District for judicial review of that order. The District Court affirmed the order of the PSC August 12, 1981, and issued a final judgment to that effect September 15, 1981. Intermountain now appeals that judgment. The District Court issued a stay of its judgment pending this appeal.

For a number of years, the PSC received complaints from the Custer area residents concerning the poor quality of telephone service provided by Intermountain. These complaints were communicated by PSC to Intermountain's management. Service did not improve. The complaints continued.

The PSC began a formal investigation, resulting in a public hearing in Custer on April 2, 1980. More than twenty Custer residents testified, along with Norman Mills, Intermountain's spokesman and a representative of Mountain Bell.

Testimony by the residents indicated that there were numerous problems with the telephone service. Ascertaining whether a phone worked or not was described as similar to playing Russian roulette. The weather affected the clarity of the connection. Incoming calls often did not ring. Wrong *76 connections occurred. Long-distance service was sometimes non-existent for extended periods of time. Telephone lines were draped over posts and on the

ground in several instances. Repairs often took several days as there was no resident repairman in Custer.

In response, Norman Mills, owner of Intermountain, testified that fifty-seven miles of long-distance wire was the responsibility of Mountain Bell, not Intermountain and that Mountain Bell failed to relay messages concerning telephone problems until several days after they were received. His personal efforts, and those of Bell operators, to duplicate the problem of incoming calls not ringing through to subscribers, were unsuccessful. Some telephone wire was in need of replacement, however, no funds existed with which to replace it. The switchboard had been updated and was now capable of handling one hundred more calls than before. **1017 Further improvements would have to await more funds. He was noncommittal on the desire of the Custer residents to have a full-time serviceman located in Custer.

Mountain Bell representatives acknowledged joint responsibility for the fifty-seven miles of long-distance telephone wire. They testified that propositions to replace the wire had been conveyed to Intermountain, but that Intermountain refused to contribute its share of money to finance the repairs.

Following the hearing and prior to issuing its order, the PSC sent an engineer to Custer to test the phones. In his report, the engineer stated he "drove to the last subscriber's house on most of the rural lines and found the quality to be normal, and got a dial tone immediately and talked to the operator in Billings." Individuals reported to him that although their phone service was presently okay, it had been inadequate in the past. Two phone lines which were "bad" were being repaired that day. Phone wires lying on the ground were being replaced by underground cable. The inside of the exchange was "not as neat as I have normally seen elsewhere, however, with further installations and rewiring *77 in progress and in evidence, I would wish to inspect the premises at a later date after all reconstruction is complete."

On the basis of the above-discussed facts, the PSC issued its final order, which the District Court affirmed. In its appeal, Intermountain presents the following issues for review:

- (1) Whether the order of the PSC was issued within the authority of the PSC?
- (2) Whether the order was supported by the evidence

on the record?

[1] Section 69-3-102, MCA, gives the PSC supervision over and regulation of public utilities. Section 69-3-201, MCA, mandates that every public utility provide "reasonably adequate service and facilities." If the PSC is to supervise utilities adequately, it must be able to ascertain whether or not a utility is providing "reasonably adequate service." Therefore, the PSC was within its authority when it issued the October 27, 1980, order stating that Intermountain was not providing "reasonably adequate service."

[2] Twenty area residents testified regarding the poor quality of telephone service provided to them. One PSC engineer testified that he found good telephone service to exist the one day he was in the area. Clearly, the findings of the PSC regarding the quality of telephone service were supported by substantial credible evidence, as required by section 2-4-704(2)(e), MCA.

Montana has no statute providing for the licensing, franchising or certifying of telephone companies wherein those companies are granted an exclusive right to serve a certain area. There is also no exclusive property right under the Territorial Integrity Act of 1971, as that Act applies to suppliers of electrical service, not telephone service. Section 69-5-103, MCA.

Telephone service competition is basically free and open in Montana, except so far as telephone cooperatives are concerned. Section 35-18-105(2), MCA, prohibits telephone *78 cooperatives from duplicating "reasonably adequate service" already in existence. But, if no "reasonably adequate service" is being provided, **telephone cooperatives** may provide service to that area.

[3] The language in the order of the PSC stating "there exists no provision of Montana law that would prohibit another telephone company, whether private or cooperative, from providing telephone service to residents of the Custer area" is merely dictum. Private telephone companies are free to compete at any time. **Telephone cooperatives** may compete when no "reasonably adequate service" is available.

The order of the PSC is affirmed.

HASWELL, C. J., and HARRISON, DALY, SHEEHY and WEBER, JJ., concur.

651 P 2d 1015

201 Mont 74, 651 P 2d 1015

(Cite as: 201 Mont. 74, 651 P.2d 1015)

SHEA, J , did not participate in this decision

201 Mont 74, 651 P 2d 1015

END OF DOCUMENT